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Liong Seow Keng & Ors v Ho Soon Cheng

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-646–05 OF 2014
NANTHA BALAN J
4 MAY 2016

C *Civil Procedure — Stay of proceedings — Application for — Pending appeal to Court of Appeal — High Court granted order for termination of trust for sale and conversion of real and personal properties in residuary estate — Whether there were special circumstances justifying stay — Whether balance of justice would lie clearly in favour of plaintiffs as beneficiaries of estate — Whether plaintiffs were*
D *suffering extreme prejudice by being deprived of their just share of assets of deceased's estate — Whether applications were attempts by defendant to delay distribution of assets of deceased — Whether defendant embarking on speculative venture to vitiate will — Whether appeal would be rendered nugatory if assets of estate distributed — Whether safe for monies to remain in defendant's custody*
E

Succession — Distribution of estate — Grant of probate amended by order of High Court — Appeal against order — Whether grant and order valid and enforceable — Whether defendant's application for forensic examination of will
F *matter of pure speculation*

The plaintiffs are the widow ('first plaintiff') and sons ('second to fourth plaintiffs') of one Quah Chin Cheng ('the deceased'), who died on 10 October 2012. The plaintiffs were also the beneficiaries under the will of the deceased
G ('the will'), while the defendant was named as the sole trustee and executor under the will. The defendant had obtained the grant of probate on 5 March 2013. The dispositions included a clause bequeathing the residuary estate of the deceased to the deceased's sons, ie the second to fourth plaintiffs, by way of a trust for sale. The relationship between the plaintiffs and the defendant
H became bitter and resulted in the plaintiffs applying to the High Court for an order that the trust for sale and conversion stipulated in the will be terminated and that the real and personal properties in the residuary estate of the deceased be transferred to the second to fourth plaintiffs instead of being sold. On 11 September 2014, the High Court granted an order for the termination of
I the trust for sale and conversion with the real and personal properties in the residuary estate of the deceased ordered to be transferred to the second to fourth plaintiffs (the order of the High Court). The defendant appealed against this decision to the Court of Appeal. However, the plaintiffs applied for an order to compel the defendant to comply with the order of the High Court

('encl 26'). The defendant in turn filed an application whereby he sought to obtain a stay of the order of the High Court ('encl 29'), pending disposal of the appeal to the Court of Appeal on, inter alia, the fact that the appeal would be rendered nugatory in the event the assets of the estate were transferred to the second to fourth plaintiffs before the hearing of the appeal. In the meantime, the defendant claimed that doubts had arisen as to the genuineness of the signature of the deceased in the will. The defendant thus filed an application and obtained an ex parte order for a forensic handwriting examination of the will. When the plaintiffs came to know of the ex parte order they applied to intervene and successfully set aside the ex parte order. However, the defendant maintained that this application was now fixed for inter partes hearing. As such, the defendant filed yet another application ('encl 35') to stay all proceedings pending the results of the forensic handwriting examination of the will. The present judgment was in respect of these three applications namely encls 26, 29 and 35. The plaintiffs strenuously opposed the defendant's stay applications on the grounds that these were attempts by the defendant to delay distribution of the assets of the deceased.

Held, allowing the plaintiff's application (encl 26) with costs of RM5,000 and dismissing the defendant's applications (encls 29 and 35) with costs of RM5,000 and RM30,000 respectively:

(1) On the one hand the defendant was prosecuting his application for stay pending appeal ie encl 29, which was predicated on the will being genuine and valid, whereas on the other hand the defendant was asking for a stay pending the results of the forensic handwriting examination of the will ie encl 35 on the premise that the signature of the deceased was or may not be genuine. This demonstrated clearly that the defendant was 'approbating and reprobating'. It was also quite odd that the defendant was attempting to impugn the genuineness of the deceased's will because if the will fell then the defendant's appointment as executor would also fall (see paras 42–43 & 45–46).

(2) After taking into consideration all the events that had occurred from the date of the grant of probate and after taking into the conduct of the defendant, the only possible conclusion that could be arrived at with regards to the defendant's conduct was that he was not prepared to distribute the assets of the deceased and was minded to take every possible step to delay the implementation of the order of the High Court. It was equally clear that the grant of probate and the order of the High Court were still valid and enforceable whereas the fate of the defendant's application for forensic examination of the will was a matter of pure speculation. The defendant was in fact trying to embark on a speculative venture in order to vitiate the will (see paras 53–54 & 59).

(3) It was a well-established principle that an order to stay court proceedings could only be granted if it was established by the party seeking a stay that there were special circumstances justifying the stay. In the present case, the second to fourth plaintiffs were suffering extreme prejudice as they were being deprived of their just share of the assets of the deceased's estate. On the other hand, the defendant had no interest in the assets of the estate of the deceased except to act in accordance with the will as modified by the order of the High Court. As such, to allow the defendant to leave the distribution of the assets of the estate of the deceased in prolonged suspended animation whilst he pursued his appeal to the Court of Appeal and at the same time pursued his speculative venture of impugning the signature of the deceased in the will was oppressive and unjust. Having regard to all the circumstances including the delay in the distribution and the prejudice to the beneficiaries, the balance of justice would lie clearly in favour of the beneficiaries of the estate of the deceased as per the will as modified by the order of the High Court (see paras 55–56 & 60).

(4) The defendant's nugatory argument had no merit. If the distribution took place as per the order of the High Court and it turned out eventually that the will was invalid and the grant of probate was set aside and the estate fell into intestacy, then it would not be too difficult to trace the assets and redistribute them pursuant to the rules of distribution as per s 6(1)(g) of the Distribution Act 1958. In addition, it was imperative to keep in mind that even if the will was invalid the beneficiaries of the estate would be the present plaintiffs with the possibility of the estate of the deceased's mother also being a beneficiary in intestacy. Even if the estate of the deceased's mother was to make a claim under intestacy, that in itself could not be a ground to presently freeze the distribution of the estate of the deceased (see paras 58 & 61).

(5) Further, the fact that the defendant had custody over a cash pile of RM90m and in view of all the events that had occurred it would be neither safe nor appropriate for these monies to remain in the hands of the defendant (see para 62).

[Bahasa Malaysia summary

Plaintif-plaintif ialah balu ('plaintif pertama') dan anak-anak lelaki ('plaintif kedua hingga plaintif keempat') kepada Quah Chin Cheng ('si mati'), yang meninggal dunia pada 10 Oktober 2012. Plaintif-plaintif juga merupakan benefisiari-benefisiari di bawah wasiat si mati ('wasiat'), manakala defendan dinamakan sebagai pemegang amanah tunggal dan wasi di bawah wasiat. Defendan telah mendapat geran probet pada 5 Mac 2013. Disposisi termasuk klausa mewariskan saki-baki harta pusaka si mati kepada anak-anak si mati, iaitu plaintif kedua hingga plaintif keempat, ialah melalui amanah untuk menjual. Hubungan antara plaintif-plaintif dan defendan menjadi keruh dan

menyebabkan plaintif-plaintif memohon kepada Mahkamah Tinggi untuk satu perintah bahawa amanah untuk jualan dan penukaran yang ditetapkan di dalam wasiat akan ditamatkan dan bahawa harta sebenar dan peribadi dalam saki-baki harta pusaka si mati dipindahkan kepada plaintif kedua hingga plaintif keempat dan bukannya dijual. Pada 11 September 2014, Mahkamah Tinggi membenarkan satu perintah untuk penamatan amanah untuk jualan dan penukaran dengan harta sebenar dan peribadi dalam saki-baki harta pusaka si mati diperintahkan supaya dipindahkan kepada plaintif kedua hingga plaintif keempat (perintah Mahkamah Tinggi). Defendan merayu terhadap keputusan ini ke Mahkamah Rayuan. Bagaimanapun, plaintif-plaintif memohon untuk satu perintah untuk memaksa defendan mematuhi perintah Mahkamah Tinggi ('lampiran 26'). Defendan seterusnya memfailkan satu permohonan di mana dia berusaha untuk mendapatkan satu penangguhan perintah Mahkamah Tinggi ('lampiran 29'), sementara menunggu rayuan ke Mahkamah Rayuan diputuskan berkenaan, antara lain, fakta bahawa rayuan tersebut akan menjadi sia-sia sekiranya aset harta pusaka telah dipindahkan kepada plaintif kedua hingga plaintif keempat sebelum pendengaran rayuan tersebut. Sementara itu, defendan mendakwa bahawa keraguan telah timbul tentang ketulenan tandatangan si mati dalam wasiat. Defendan dengan itu memfailkan permohonan dan memperoleh perintah ex parte untuk pemeriksaan tulisan tangan forensik wasiat. Apabila plaintif mendapat tahu tentang perintah ex parte mereka memohon untuk campur tangan dan berjaya mengetepikan perintah ex parte. Walau bagaimanapun, defendan menegaskan bahawa permohonan ini telah ditetapkan untuk pendengaran inter partes. Oleh itu, defendan memfailkan lagi permohonan lain ('lampiran 35') untuk menangguhkan semua prosiding sementara menunggu keputusan pemeriksaan tulisan tangan forensik ke atas wasiat tersebut. Penghakiman ini berkenaan dengan ketiga-tiga aplikasi iaitu lampiran 26, 29 dan 35. Plaintif-plaintif dengan keras menentang permohonan penangguhan defendan atas alasan bahawa ini adalah percubaan oleh defendan untuk menangguhkan pengagihan aset-aset si mati.

Diputuskan, membenarkan permohonan plaintif (lampiran 26) dengan kos sebanyak RM5,000 dan menolak permohonan defendan (lampiran 29 dan 35) dengan kos sebanyak RM5,000 dan RM30,000 masing-masing:

(1) Sementara itu, defendan mendakwa permohonannya untuk penangguhan sementara menunggu rayuan iaitu lampiran 29, yang sudah dijangkakan dalam wasiat tersebut adalah asli dan sah, manakala di pihak yang lain, defendan memohon untuk satu penangguhan sementara keputusan pemeriksaan tulisan tangan forensik wasiat iaitu lampiran 35 berdasarkan premis bahawa tandatangan si mati adalah atau mungkin tidak tulen. Ini menunjukkan dengan jelas bahawa defendan adalah 'approbating dan reprobating'. Adalah agak ganjil bahawa defendan cuba untuk meragui ketulenan wasiat si mati kerana sekiranya benar, maka

pelantikan defendan sebagai wasi juga akan terjejas (lihat perenggan 42–43 & 45–46).

(2) Selepas mengambil kira semua peristiwa yang telah berlaku dari tarikh perintah probet dan selepas mengambil kira tindakan defendan, satu-satunya kesimpulan munasabah yang boleh dicapai yang berkaitan dengan kelakuan defendan adalah bahawa dia tidak bersedia untuk membahagikan aset si mati dan berfikiran untuk mengambil setiap langkah yang mungkin melambatkan pelaksanaan perintah Mahkamah Tinggi. Adalah sama jelas bahawa pemberian probet dan perintah Mahkamah Tinggi masih sah dan boleh dikuatkuasakan manakala nasib permohonan defendan untuk pemeriksaan forensik wasiat adalah satu spekulasi semata-mata. Defendan sebenarnya cuba untuk memulakan usaha spekulatif untuk melemahkan wasiat (lihat perenggan 53–54 & 59).

(3) Adalah satu prinsip yang terbukti bahawa satu perintah untuk penangguhan prosiding mahkamah hanya boleh diberikan sekiranya dibuktikan oleh pihak yang menuntut satu penangguhan bahawa terdapat keadaan khas yang mewajarkan penangguhan. Dalam kes ini, plaintif kedua hingga keempat menderita kebencian yang melampau kerana mereka dihalang daripada bahagian adil aset-aset harta pusaka si mati. Sebaliknya, defendan tidak mempunyai kepentingan dalam aset harta pusaka si mati kecuali untuk bertindak mengikut wasiat sebagaimana yang diubahsuai melalui perintah Mahkamah Tinggi. Oleh itu, untuk membenarkan defendan untuk meninggalkan pengagihan aset harta pusaka si mati secara 'prolonged suspended animation' sementara dia meneruskan rayuannya ke Mahkamah Rayuan dan pada masa yang sama meneruskan usaha spekulatifnya mempersoalkan tandatangan si mati dalam wasiat adalah menindas dan tidak adil. Dengan mengambil kira semua keadaan termasuk kelewatan dalam pengagihan dan prasangka kepada benefisiari-benefisiari, imbangan keadilan akan secara jelas memihak kepada benefisiari-benefisiari harta pusaka si mati mengikut wasiat sebagaimana yang diubahsuai oleh perintah Mahkamah Tinggi (lihat perenggan 55–56 & 60).

(4) Hujah defendan yang sia-sia itu adalah tanpa merit. Jika pengagihan berlaku mengikut perintah Mahkamah Tinggi dan ternyata akhirnya bahawa wasiat tersebut tidak sah dan geran probet diketepikan dan harta itu terangkum dalam kematian tidak berwasiat, maka adalah tidak terlalu sukar untuk mengesan aset dan mengagihkan semula aset-aset mengikut peraturan pengagihan seperti s 6(1)(g) Akta Pembahagian 1958. Di samping itu, adalah penting untuk diingati bahawa meskipun wasiat tersebut tidak sah, benefisiari-benefisiari harta pusaka tersebut akan menjadi plaintif-plaintif sekarang dengan kemungkinan harta pusaka ibu si mati juga menjadi benefisiari dalam kematian tidak berwasiat. Malah,

walaupun harta pusaka ibu si mati adalah untuk dibuat tuntutan di bawah kematian tak berwasiat, itu dengan sendirinya tidak boleh menjadi alasan untuk membekukan pembahagian harta pusaka si mati (lihat perenggan 58 & 61).

(5) Selanjutnya, fakta bahawa defendan mempunyai hak penjagaan ke atas timbunan tunai RM90 juta dan dengan berpandukan semua peristiwa yang telah berlaku, adalah tidak selamat dan tidak sesuai untuk wang tersebut kekal di tangan defendan (lihat perenggan 62).]

Notes

For cases on application for stay of proceedings, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 8518–8564.

For cases on distribution of estate in general, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 2525–2580.

Cases referred to

Beddoe; Downes v Cottam, Re [1893] 1 Ch 547, CA (refd)

Cowan and Others v Scargill and Others [1985] Ch 270, Ch D (refd)

H Somapah Deceased, Re [1946] 1 MLJ 25 (refd)

Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213, CA (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)

Lee Yoke San & Anor v Tsong Sai Sai Cecilia & Anor [1993] 1 SLR 602, HC (refd)

Ligar Fernandez v Eric Claude Cooke [2002] 5 MLJ 177; [2002] 6 CLJ 152, HC (refd)

Liong Seow Keng & 3 Ors v Ho Soon Cheng [2014] 6 AMR 608, HC (refd)

Smith & Fawcett Ltd, Re [1942] Ch 304, CA (refd)

Tan Soo Lock v Tan Jiak Choo and another [1935] 4 MLJ 202 (refd)

Turner v Hancock (1882) 20 Ch D 303, CA (refd)

Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor [2015] 7 MLJ 305, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2), Schedule, para 16

Distribution Act 1958 s 6(1)(g)

Rules of Court 2012 O 45 rr 6(2), (3), O 92 r 4

Harmeet Singh (Chan Mun Fei with him) (Raja Eleena Siew Ang & Assoc) for the plaintiffs.

Raymond Mah (Choo Mun Wei with him) (Mah Weng Kwai & Assoc) for the defendant.

Nantha Balan J:

INTRODUCTION

[1] These are my grounds of judgment in respect of three applications namely encls 26, 29 and 35. Enclosure 26 is an application by the plaintiffs to compel the defendant to comply with the order of this court dated 11 September 2014. Enclosures 29 and 35 were filed by the defendant. Enclosure 29 is an application for stay pending appeal against the order dated 11 September 2014. Enclosure 35 is an application for stay of proceedings pending the forensic handwriting examination of the last will and testament of the deceased, which is the subject matter of the present proceedings.

BACKGROUND

[2] The plaintiffs are the beneficiaries under the last will and testament of Quah Chin Cheng ('the deceased') dated 17 September 2012 ('the will'). The first plaintiff is the widow of the deceased. The second to fourth plaintiffs are the sons of the deceased. The defendant was named as the sole trustee and executor under the will. The deceased died on 10 October 2012. The defendant filed an application for grant of probate by way of Penang High Court Originating Summons No 32NCVC-10–01 of 2013 ('the probate OS'). The grant of probate was given on 5 March 2013 and issued on 19 March 2013.

[3] Under cl 8 of the will, the first plaintiff was given a sum of RM5m as a gift. Pursuant to cl 5 of the will, one property was specifically bequeathed to the second to fourth defendants in the proportion of one third share each. Pursuant to cl 9 of the will, the residuary estate was bequeathed to the second to fourth plaintiff by way of a trust for sale.

[4] For present purposes, it would suffice to say that for a variety of reasons, the relationship between the plaintiffs and the defendant became acrimonious and bitter. The plaintiffs applied to the court by way of the present originating summons which was filed on 2 May 2014 ('the KLOS') for, inter alia, an order that the trust for sale and conversion of the real and personal properties in the residuary estate be terminated and for the same to be transferred in specie to the beneficiaries instead of being sold.

TERMINATION OF THE TRUST FOR SALE

[5] On 11 September 2014, the learned judicial commissioner granted order in terms of the KLOS and terminated the trust for sale and conversion and ordered the real and personal properties in the residuary estate of the

deceased to be transferred to the second to fourth plaintiffs as beneficiaries under the will. The grounds of judgment of the learned judicial commissioner has been reported as *Liong Seow Keng & 3 Ors v Ho Soon Cheng* [2014] 6 AMR 608.

[6] The order dated 11 September 2014 reads as follows:

(i) bahawa amanah untuk dijual dan penukaran ('trust for sale and conversion') yang diisytiharkan oleh Quah Chin Cheng, si mati (selepas ini dikenali sebagai 'Pewasiat tersebut'), di bawah klausa 9 diwasiatnya yang bertarikh 17 September 2012 (selepas ini dirujuk sebagai 'Wasiat tersebut') ditamatkan dan segala harta-harta alih dan tak alih yang dipegang di bawah ini ('there under') oleh Defendan dipindahmilik kepada Plaintif Ke-2. Plaintif Ke-3 dan Plaintif Ke-4 dalam bahagian-bahagian yang sama rata;

(ii) Bahawa akaun-akaun penuh dan teratur untuk Harta Pusaka tersebut dibekalkan oleh Defendan kepada Plaintif-plaintif dan/atau peguamcara plaintif-plaintif dalam 7 hari dari tarikh perintah Mahkamah Yang Mulia ini iaitu 7 hari dari 11 September 2014;

(iii) Bahawa Defendan dihalang daripada melantik dirinya dan seorang bernama LIM BIAN CHAI (NRIC NO 660806–07–5049) (selepas ini dikenali sebagai 'Lim Bian Chai' sebagai pengarah-pengarah Cosyland (M) Sdn Bhd (No Syarikat 565945-T) (selepas ini dikenali sebagai 'Cosyland') dengan melaksanakan kuasa pengundian yang diperolehi daripada 249,999 saham-saham biasa yang dmiliki oleh Harta Pusaka tersebut di dalam Cosyland (selepas ini dirujuk sebagai Saham-saham Cosyland tersebut);

(iv) Bahawa Defendan dihalang daripada melaksanakan kuasa pengundian yang diperolehi daripada saham-saham Cosyland tersebut untuk mengundi bertentangan dengan perlantikan semula Plaintif Ke-3 sebagai Pengarah Cosyland.

(v) Bahawa Defendan dihalang daripada menjual bakian harta pusaka Pewasiat tersebut atau mana-mana bahagian daripadanya; dan

(vi) Tiada perintah untuk kos.

THE APPEAL

[7] On 10 October 2014, the defendant filed a notice of appeal to Court of Appeal and the appeal has been registered as W-02(NCVC)(A)-1777–10 of 2014 ('the appeal'). To date, the appeal has not been disposed off and the status presently is that it is fixed for case management before the registrar of the Court of Appeal on 13 May 2016.

THE APPLICATION TO COMPEL THE DEFENDANT

[8] Enclosure 26 is an application by the plaintiff under O 45 rr 6(2) and 6(3) of the Rules of Court 2012, s 25(2) and para 16 of the Schedule to the Courts of Judicature Act 1964 and/or the inherent jurisdiction of the court under O 92 r 4 of the Rules of Court 2012 to compel the defendant to comply with the order dated 11 September 2014.

[9] The order of the court on 11 September 2014 was essentially an order, inter alia, that the trust for sale and conversion stipulated in the will, be terminated and that the real and personal properties in the residuary estate of the deceased be immediately transferred in specie (in their present form) to the second to fourth plaintiffs as beneficiaries instead of being sold.

THE APPLICATION FOR STAY PENDING APPEAL

[10] By way of encl 29, which was filed on 14 August 2015, the defendant seeks to obtain a stay of the order dated 11 September 2014 pending disposal of the appeal to the Court of Appeal. Briefly stated the defendant's grounds in moving the court for a stay pending appeal are as follows:

(1) There are special circumstances that warrant a stay of the Order dated 11 September 2014 pending the disposal of the Defendant's appeal to the Court of Appeal vide Civil Appeal No W-02(NCVC)(A)-1777–10/2014 ('Appeal').

(2) The Estate consists of various assets totaling approximately RM150 million in value.

(3) The Defendant is appealing against, among others, the order terminating the trust for sale and conversion created in the last will and testament ('Will') of Quah Chin Cheng, deceased ('Testator') and the order that all real and personal properties of the Estate be transferred to the 2nd, 3rd and 4th Plaintiffs in equal shares.

(4) In compliance with the Order dated 11 September 2014, the Defendant has refrained from selling any of the assets of the Estate for the purpose of maintaining the status quo pending the Appeal. The Defendant has also refrained from distributing the assets of the Estate to the 2nd, 3rd and 4th Plaintiffs in order to maintain the status quo pending the Appeal.

(5) The Appeal will be rendered nugatory in the event the assets of the Estate are transferred to the 2nd, 3rd and 4th Plaintiffs before the hearing of the Appeal. By such time the Estate would have been fully administered and, in the event the Appeal is allowed, there will no longer be any assets in the Estate for the Defendant to administer in accordance with the terms of the Will.

DOUBTS ABOUT THE SIGNATURE OF THE DECEASED

[11] In the meanwhile, certain developments have taken place in the probate OS. The defendant has alleged that a certain 'claimant' has come forward to say that the deceased had promised to give him a 'gift' and that the absence of a 'gift' in the will in favour of the so-called claimant has cast doubt on the genuineness of the signature of the deceased in the will. The defendant says that after he had been apprised of this information he compared the signature of the deceased in the will with other documents and found that there are differences. As such, the defendant is of the view that it is necessary for a forensic handwriting examination to be conducted to determine the genuineness of the will.

THE EX PARTE ORDER IN THE PROBATE OS

[12] Consequently, the defendant asserts that there are doubts about the deceased's signature in the will and has sought to obtain an order for a forensic handwriting examination to be conducted so as to determine the authenticity and genuineness of the signature of the deceased appearing in the will. The defendant duly filed an application in the probate OS by way of encl 12 and obtained an ex parte order dated 5 October 2015 ('the ex parte order') by which the Penang High Court ordered that there be a forensic handwriting examination of the will.

[13] In the course of case management in the present proceedings, the plaintiffs came to know of the ex parte order and they promptly applied to intervene in the probate OS in order to set it aside. The plaintiffs successfully intervened in the probate OS. On 22 March 2016, the learned judicial commissioner of the Penang High Court ruled in favor of the present plaintiffs and set aside the ex parte order. The specific grounds on which the ex parte order was set aside is not known as I have not seen the grounds of judgment. At the last hearing date, I directed parties to send a copy of the grounds of judgment to this court, in the event it becomes available before delivery of the court's decision on the applications that are presently pending before me.

[14] The present status of the matter in the probate OS is that the parties ie the defendant herein and the plaintiffs (as interveners) are locked in a dispute as to the fate of encl 12. The plaintiffs' contend that the application for forensic examination (encl 12 in the probate OS) has been 'spent' as the ex parte order has been set aside. However, the defendant maintains otherwise and contends that the application is very much alive. The learned judicial commissioner of Penang High Court has directed parties to submit on this issue and it remains to be seen whether encl 12 in the probate OS is still alive or has been spent. In any event, it now appears that encl 12 has been fixed for 'inter partes' hearing.

[15] I was also informed by the parties that the learned judicial commissioner had ordered the defendant to pay a sum of RM25,000 as costs 'personally' (not out of the assets of the estate of the deceased) in respect of the ex parte order that was set aside. The plaintiffs interpret this to mean that encl 12 was a frivolous application, whereas the defendant states that there is no finding by the Penang High Court that it was a frivolous application.

STAY PENDING FORENSIC EXAMINATION OF THE WILL

[16] I now turn to deal with encl 35 which is the defendant's application to stay the present proceedings until the results of the document examination in the probate OS are disposed off. This is of course on the assumption that encl 12 is still valid and is alive. As I said, encl 12 in the probate OS has been fixed for inter partes hearing but counsel for the plaintiffs has informed me that he will be taking up the requisite objections when the matter comes up. For now, I will just leave it at that.

[17] Enclosure 35 is made under O 92 r 4 of the Rules of Court 2012 and/or under the inherent jurisdiction of the court. The order that is sought in encl 35 is that, 'all further proceedings in this action be stayed until the disposal of the defendant's application dated 24 August 2015 filed under Penang High Court Originating Summons No 32NCVC-10–01 of 2013 ('Penang HC application'), and in the event the Penang HC application is allowed, until the results of the document examination ('document examination') of the last will and testament dated 17 September 2012 ('will') of Quah Chin Cheng, deceased ('testator') are obtained from the Department of Chemistry, Ministry of Science, Technology and Information Malaysia ('department of chemistry')'.

[18] Briefly stated the grounds on which the defendant moves this court for a stay of proceedings under encl 35 are as follows:

(1) In the Penang HC Application, the Defendant is asking for the Will to be taken from the registry of the Penang High Court for the Document Examination to ascertain whether the signature thereon is the Testator's signature or is a forgery.

(2) The proceedings before this Court include the Plaintiffs' application dated 10 July 2015 ('Plaintiffs' Application to Execute') which seeks, among other things, an order that the Defendant transfer all moveable and immoveable properties of the Estate to the 2nd, 3rd and 4th Plaintiffs within 14 days ('Paragraph (i) of the Order dated 11 September 2014').

(3) Distribution of the residuary Estate pursuant to Paragraph (i) of the Order dated 11 September 2014 is premised on the 2nd, 3rd and 4th Plaintiffs' entitlement to the Estate based on the Will. If the signature on the Will is

found to be forged and the Will is rendered a nullity, the 2nd, 3rd and 4th Plaintiffs would no longer be so entitled.

(4) There are special circumstances that warrant a stay of the proceedings herein including the Plaintiffs' Application to Execute, pending the determination of the Penang HC Application and the Document Examination.

(5) The Penang HC Application and the Document Examination would be rendered nugatory and academic if the proceedings in this Honourable Court are not stayed and the Defendant is compelled to forthwith distribute the properties in the Estate to the Plaintiffs.

STAY OF PROCEEDINGS — THE LAW

[19] It is a well established principle that an order to stay court proceedings can only be granted if it is established by the party seeking a stay that there are special circumstances justifying the stay. The principle may be gathered from the seminal case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 where the Federal Court said:

> [9] The need to establish the existence of special circumstances to enable the court to grant a stay of execution has been well-established in this country ...
>
> [12] ... there must be '*strong justification*' for a party to come within an exception to a general rule. (Emphasis added.)

[20] More recently, the Court of Appeal in *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213 restated and reformulated the principles for stay of proceedings as follows:

> [22] ...
>
> (b) An unsuccessful party applying for a stay must show 'special circumstances'. What will constitute 'special circumstances' will no doubt vary from case to case. The fact that an appeal would be rendered nugatory if stay was refused is the most common one (see *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1) ... The application is not granted as a matter of routine and it is not an automatic or mechanical relief slavishly followed after filing an appeal. In every matter or suit before a court of law, whether in its original or appellate stage of proceedings, *the court will consider the competing rights of both parties including the applicant and respondent to justice*.
>
> (c) There is a need to preserve the res or preservation of the subject matter of litigation. The courts have an obligation to protect the res for the purpose of ensuring that the appeal, if successful, will not be rendered nugatory (see *Erinford Properties Ltd v Cheshire County Council* [1974] 2 WLR 749). But where it is shown by affidavit evidence, say by the respondent, that the res will not be destroyed or

there is in fact no res, an application may not be granted.

(d) *Where an application is an abuse of the court process, then the stay of proceedings will not be granted*. A typical example of abuse of court process is where a suit is duplicated or where a party employs improper and perverse procedure to obtain an advantage undeservedly.

(e) It is important to stress that initiation of a suit in a court of law demands the suit will be heard expeditiously and completed without any inhibition midway. Therefore, where an application for stay of proceedings is intended to merely stop or suspend the proceedings; it will be refused. Some applicants, on seeing the weakness of their client's case, would resort to application for stay and thereby waste the time of the other party and the court. The party simply cannot resort to the interlocutory of stay proceedings on having the slightest disagreement with any ruling of a trial judge. Courts are enjoined not to encourage such unwholesome practice.

(f) An applicant for stay of proceedings must come with clean hands because what he is asking is an equitable relief. Equity will not assist the unclean. That is why *the court has to look into the antecedents of the parties*. (Emphasis added.)

[21] Further, in *Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor* [2015] 7 MLJ 305 the High Court held that when dealing with an application for stay of proceedings the court should consider, inter alia, the balance of justice and prejudice:

23. In deciding whether proceedings can be stayed pending the disposal of an appeal, the following factors should be considered:

(b) in *Chinese Chamber Realty Pte Ltd & Ors v Samsung Corp (No 2)* [2003] 4 SLR 313, at para 3, the Singapore High Court considered *the balance of convenience (now popularly known as balance of justice), namely a comparison of the existence, nature and extent of prejudice which may be suffered by the parties if proceedings are stayed or otherwise*;

...

(d) whether there is an unexplained delay in applying for a stay of proceedings. (Emphasis added.)

THE ARGUMENTS

[22] In opposing encl 35, it was argued for the plaintiffs that the defendant's application in the probate OS to take the will and subject the same to document examination of the deceased's signature does not amount to a special circumstance which justifies a stay of the proceedings before this court.

[23] According to counsel for the plaintiff, nothing will be rendered nugatory in the probate OS because the ex parte order has been set aside and presently there is no basis to set aside the grant of probate dated 5 March 2013 which remains valid and in force. On that analysis, counsel for the plaintiffs argues that there is no change in the circumstances in the probate OS.

[24] Additionally, counsel for the plaintiffs argues that this court had also granted a valid order dated 11 September 2014 in the KLOS the effect which is that the trust for sale under the will has been terminated and the deceased's assets are to be distributed to the second, third and fourth plaintiffs equally. It was emphasised that the plaintiffs in the KLOS, including the widow of the deceased are vigorously opposing any attempt by the defendant to delay distribution of the assets of the deceased. According to the plaintiffs, the defendant's application for stay, namely encls 29 and 35 are a manifestation of delaying tactics on the defendant's part. Further, it is alleged that the two applications for stay by the defendant are contradictory to each other.

[25] The plaintiffs maintain that the defendant does not have any interest in the deceased's assets and the assets would ultimately have to be transferred to the second, third and fourth plaintiffs whether in specie or in the form of proceeds of the sale of the deceased's estate. It was emphasised that the defendant did not raise any issue about the alleged discrepancy of the deceased's signature in his will when he applied for the grant of probate or in encl 29 (application for stay pending appeal) when it was filed on 13 August 2015.

[26] In terms of time lines, it was pointed out that when encl 29 was filed, the defendant had already been approached by the so-called 'claimant' and had conducted a comparison of the signature. Hence, it was contended that the defendant quite perplexingly only raised this issue in encl 35 which was separately filed as late as 25 September 2015, after encls 26 and 29 had been fixed for hearing during the case management on 27 August 2015. Hence, the plaintiffs' maintain that if there was a genuine reason to dispute the will, the defendant ought to have raised this in encl 29, and not by filing a second application for stay.

[27] In the circumstances, the plaintiffs allege that the issue about the alleged discrepancy of the deceased's signature, the application in the probate OS ('encl 12') and encl 35 herein are collectively a clear afterthought and raised by the defendant merely to delay the proceedings before this court and specifically to delay the distribution of the deceased's assets.

[28] In terms of the imperative duties of the defendant, it was submitted that pursuant to the grant of probate dated 5 March 2013 and the appointment of the defendant as the executor of the deceased's estate, the defendant's duty is to

administer the deceased's property and carry into effect the provisions of the will. Counsel argued that in doing so, it is the defendant's duty to exercise his powers in the best interest of the plaintiffs as the beneficiaries of the deceased's assets (see *Cowan and Others v Scargill and Others* [1985] Ch 270; *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177; [2002] 6 CLJ 152; *Lee Yoke San & Anor v Tsong Sai Sai Cecilia & Anor* [1993] 1 SLR 602).

[29] As such, the plaintiffs maintain rather vehemently that instead of carrying out his duties as executor, the defendant had embarked on a frolic of his own to question the authenticity of the will. By so applying (encl 12) in the probate OS to remove and examine the will, the defendant has acted contrary to his duties and beyond his jurisdiction as an executor.

[30] To the extent that the defendant contends that there may be third party claims against the estate of the deceased, the plaintiffs contend that if at all there are any claims by any third party against the deceased's estate, which is denied, the onus is on that interested party to make the appropriate claim against the deceased's estate. It was submitted that it was for the interested parties to impugn the will and that it is contrary to the defendant's duties as an executor to impugn the will.

ANALYSIS AND CONCLUSION

[31] Having regard to the chronology of events as set out above, the critical issue before me is whether the proceedings in the KLOS should be held in abeyance and for the status quo to be maintained pending disposal of the defendant's appeal in the Court of Appeal and/or pending disposal of the ongoing dispute in the probate OS in relation to whether encl 12 is spent or is still alive or pending disposal of encl 12 and/or pending the outcome of any court ordered handwriting analysis.

[32] Presently, the status is that there is as yet, no order for any forensic examination of the will. It is rather significant that the defendant did not have any queries or reason to suspect that anything was amiss in relation to the signature of the deceased when he applied for grant of probate. The grant of probate itself was given by the court on 5 March 2013.

[33] Thus, the premise on which the defendant now seeks to ascertain the genuineness of the signature of the deceased appearing in the will is that he has received 'information' from a 'claimant' which leads him to suspect that it may not be the genuine signature of the deceased. It is to my mind significant that the defendant has chosen not to identify the so-called claimant.

[34] In this regard, the defendant says that the identity of the so-called claimant is not important. I am not sure why the defendant chooses to be rather secretive about the identity of the so-called 'claimant'. The plaintiffs' speculate that there is no such claimant. They may be right. But I cannot say one way or the other, whether there is such a claimant.

[35] In any event, the defendant argues that if the will is impugned on the basis that the signature of the deceased is not genuine then the estate will fall into intestacy and the beneficiaries will receive their share of the estate in accordance with the rules of distribution as provided for under s 6(1) (g) of the Distribution Act 1958. In this regard, it is important to bear in mind that the beneficiaries of the estate of the deceased are the plaintiffs in the KLOS and they are averse to any effort by the defendant to impugn the signature of the deceased in the will which will delay the distribution of assets of the estate of the deceased.

[36] In his submissions, counsel for the defendant said that distribution of assets should not take place as one quarter of the estate will go to the mother of the deceased in intestacy. But, I find that there is nothing in the defendant's affidavit about the entitlement of the deceased's mother in intestacy and as to whether she was/is even alive. But I do recollect that it was mentioned by counsel during oral submission that the mother of the deceased was alive when the deceased died and that she passed away subsequently.

[37] At any rate, even if the mother of the deceased was alive when the deceased passed away, then it is for her or her estate to make a claim in intestacy and in order to do that, she or her estate would have to set aside the grant of probate by impugning the will. But at present, the estate of the deceased's mother has not stepped forward and there is no such application by the estate of the late mother of the deceased and the grant of probate remains valid.

[38] As was rightly pointed out and emphasised very trenchantly by counsel for the plaintiffs, the order of this court dated 11 September 2014 has not to date been set aside. More significantly, the grant of probate dated 5 March 2013 has also not been set aside to date. As such, both these orders are very much extant and are enforceable. The suggestion that there may be a claim by a so-called 'claimant' or that the estate of the late mother of the deceased may have a share in intestacy are just too speculative as there is presently no intestacy.

[39] I find that there has been an inordinate delay on the part of the defendant in making the application for stay of proceedings ('encl 35') pending a so-called forensic examination. In this regard, it is important to note that

encl 12 in the probate OS was itself filed on 24 August 2015 ie about 17 months after the grant of probate was given.

[40] It may be recalled that apart from encl 35, the defendant has also filed encl 29 to stay the order dated 11 September 2014 pending disposal of the defendant's appeal to the Court of Appeal which in turn is predicated on the genuineness of the will. As such, the defendant is obviously having more than one bite of the proverbial 'cherry' and seeks to obtain a stay under two separate applications which are somewhat contradictory to each other in terms of whether the will is regarded as genuine or invalid.

[41] In considering the application for stay under encl 35, I had to bear in mind that one of the important criteria for the exercise of the court's discretion is that the subject matter of the stay of proceedings should not be rendered nugatory. The question is always, whether the subject matter would be rendered nugatory if the appeal is allowed or if some other event were to eventuate. This is where I had great difficulty in reconciling the defendant's stand.

[42] As I said earlier, on the one hand, the defendant is prosecuting his application for stay pending appeal ('encl 29'), which is predicated on the will being genuine and valid, whereas on the other hand the defendant is asking for stay pending the determination of a handwriting analysis of the deceased's signature ('encl 35') on the premise that the signature of the deceased is or may not be genuine.

[43] This demonstrates to me quite clearly that the defendant is 'approbating and reprobating'. I will make no comment about the merits of encl 12 which is being debated in the probate OS. I also make no comment about the ex parte order and the criticism that has been made about the manner in which the ex parte order was obtained. All of those matters are for the learned judicial commissioner of the Penang High Court to deal with and decide. It is fair to say that the learned judicial commissioner has already dealt with some aspects of the ex parte order and has set it aside. But since I have not seen his grounds of judgment, I will not say anything which may not be reflective of his reasoning. But an award of costs of RM25,000 to be paid 'personally' by the defendant is indeed quite telling. This brings me to another point.

[44] On 30 March 2016, when parties appeared before me, I directed parties to forward only the learned judicial commissioner's grounds of judgment in respect of his decision dated 22 March 2016. I specifically directed that there shall be no further affidavits by any party. But, contrary to my directive, the defendant has unilaterally filed an affidavit ('encl 53') affirmed on 28 April 2016 annexing a preliminary handwriting report by one William Pang who

gave an opinion that questions the validity of the deceased's signature on the will. I must say quite emphatically that this affidavit (encl 53) was filed by the defendant in violation of the court's express directive that there shall be no further affidavit.

[45] As such, I have no hesitation in rejecting it. But, it is obvious that the defendant has gone to great lengths to secure the services of William Pang in order to impugn the genuineness of the deceased's signature on the will. I find this to be quite odd. If the will falls then the defendant's appointment as executor also falls.

[46] I also find it odd that the defendant is taking active steps to impugn the will even though the question as to whether he is entitled to subject the will to forensic analysis is still pending in the probate OS.

[47] I will leave open the question as to whether the defendant as executor under the will has the locus standi to take any such steps to impugn the will, especially after he had himself applied for and obtained the grant of probate. Those are pre-eminent questions for the Penang High Court to decide in the probate OS.

[48] But for present purposes, it is I think relevant to have regard to the fact that in a letter dated 5 May 2015, the defendant's solicitors (exh QDY5 encl 49) wrote to the plaintiffs' solicitors and informed them that a person described as a 'claimant' had approached the defendant and informed the latter that the deceased had promised a monetary gift and enquired whether the 'gift' was included in the will. In that letter the defendant had asserted that the so-called claimant 'firmly believed' that the deceased would have honoured his promise and that the absence of the gift in the will had caused the claimant to question the authenticity of the will.

[49] The defendant thereafter took the position that he would withhold distribution of the assets. In response, the plaintiffs' solicitor sent a letter dated 11 June 2015 doubting the existence of such a claimant and insisted that the defendant do distribute the assets in accordance with the order dated 11 September 2014 (see exh QDY7 encl 49).

[50] The defendant's response through his solicitors letter dated 11 June 2015 (exh QDY6 encl 49) was, inter alia, that, 'The issue now is not the identity of the claimant but the authenticity of the testator's signature on the will'. Quite obviously, the defendant was not prepared to disclose the identity of the so-called claimant to the plaintiffs.

[51] On 10 July 2015 the plaintiffs filed encl 26. On 14 August 2015 encl 29

was filed by the defendant, seeking a stay of the order dated 11 September 2014 pending the appeal to the Court of Appeal. On 24 August 2015, the defendant filed encl 12 in the probate OS.

[52] On 25 September 2015, the defendant filed encl 35 seeking a stay of proceedings in the present OS pending the disposal of the defendant's application dated 24 August 2015 filed in the probate OS and in the event the application is allowed, then that there be a stay until the results of the forensic examination of the will are obtained from the department of chemistry.

[53] In my view, taking all the above events and the conduct of the defendant into consideration, the only possible conclusion that I could arrive at with regards to the defendant's conduct is that he is not prepared to distribute the assets of the deceased and is minded to take every possible step to delay the implementation of the order of the court in the KLOS dated 11 September 2014.

[54] It is clear that the grant of probate dated 5 March 2013 is still valid and has not been set aside. Similarly the order dated 11 September 2014 granted in the KLOS is still valid and is enforceable. Presently, there is no certainty as to the outcome of the dispute that is on-going in the probate OS particularly as to the fate of encl 12. As such, it is a matter of pure speculation and conjecture that an order will be made for forensic examination of the will and/or that the will may be set aside as being a forgery and/or the grant of probate dated 5 March 2013 will be set aside. All of this including the issue of intestacy belong presently to the realm of speculation and remains very much 'afloat in a sea of uncertainty'.

[55] In the meanwhile, the plaintiffs, particularly the second and fourth plaintiffs, who are the lawful sons of the deceased are suffering extreme prejudice as they are being deprived of their just share of the assets of the deceased's estate ie their late father. I agree that the defendant has no interest as such in the assets of the estate of the deceased and his duty is only to act in accordance with the terms of the will, as modified by the order dated 11 September 2014.

[56] As such, to allow the defendant to leave the distribution of the assets of the estate of the deceased in prolonged suspended animation whilst he pursues his appeal to the Court of Appeal and at the same time pursues his speculative venture of impugning the signature of the deceased in the will is to my mind, oppressive and unjust to say the least. Having regard to all the circumstances including the delay in the distribution and the prejudice to the beneficiaries, it

is my view that the balance of justice lies clearly in favour of the beneficiaries of the estate of the deceased as per the will (as modified by the order dated 11 September 2014).

[57] Indeed, in so far as the nugatory argument is concerned, I take the view that if distribution of the assets takes place as per the order dated 11 September 2014 and it turns out eventually that the will is invalid (for any reason whatsoever) and the grant of probate is set aside and the estate falls into intestacy, then it would not be too difficult to trace the assets and redistribute them pursuant to the rules of distribution as per s 6(1)(g) of the Distribution Act 1958. It is imperative to keep in mind that the beneficiaries of the estate of the deceased will be none other than the present plaintiffs themselves with the possibility of the estate of the deceased's mother also being a beneficiary in intestacy.

[58] But all of that remains to be seen. Even if by chance the estate of the deceased's mother eventually decides to make a claim under intestacy, then I cannot see how that in itself can be a ground to presently freeze the distribution because of the defendant's adamant stance that distribution should be withheld on account of what he believes to be circumstances which may vitiate the will and by extension the grant of probate dated 5 March 2013.

[59] As I said earlier, and which bears repeating, the defendant is embarking on a speculative venture in order to vitiate the will. This is odd behavior for an executor whose appointment is derived from the very document which he seeks to impugn. The conduct of the defendant is in the circumstances, unfathomable. The desire to delay is quite apparent and blatant. But, I am not prepared to entertain any other motive as it is improper to determine motive by way of affidavits (see *Re Smith & Fawcett Ltd* [1942] Ch 304).

[60] Although it is tempting to accede to the notion that the status quo should be maintained and that distribution should be withheld pending the materialisation of further events, the present circumstances are such that it would be, as I said earlier, unjust, oppressive and plainly unfair to the beneficiaries if distribution is withheld or delayed any further.

[61] There is just no evidence that if the assets are distributed to the beneficiaries, they cannot be retraced and recovered in the event the will is later impugned and the grant of probate is set aside. Consequently, there is no justification for the conclusion that it would be difficult and onerous to recover the assets once they are distributed.

[62] Before I conclude, I should add that another dimension to the present circumstances that weighs heavily on my mind is the fact that the defendant has

custody over a cash pile of RM90m (Ringgit Ninety Million) which represents 95% of the assets of the estate and the question is whether in view of all that has happened to-date, it is safe or appropriate for these monies to remain in the hands of the defendant. As I said earlier, the defendant is clearly 'approbating and reprobating' and seeking to delay distribution of the assets whilst at the same time doubting the authenticity of the signature of the deceased in the will and such conduct by the defendant when viewed in its proper perspective erodes the confidence of the court and raises doubts as to whether the assets are safe and should remain in the hands of the defendant. In my view, it would be safer and indeed just and appropriate to allow for distribution to take place as these monies, will after all, be distributed to the lawful sons of the deceased and not to persons who are strangers to the estate.

THE OUTCOME AND THE ISSUE OF COSTS

[63] In the circumstances, for the reasons as discussed above, I allowed encl 26 with costs and dismissed encls 29 and 35, also with costs. Before I made the orders in respect of costs, it was submitted for the plaintiffs that the defendant's conduct was unreasonable and that he should be personally liable for costs. Counsel referred to the following:

(a) *Turner v Hancock* (1882) 20 Ch D 303;

(b) in *Re Beddoe; Downes v Cottam* [1893] 1 Ch 547; and

(c) *Halsbury's Laws of England* (Vol 17, 4th Ed) para 918.

[64] On the other hand, it was argued for the defendant that he did not gain from the steps that he had taken and that he is not guilty of any unreasonable conduct or misconduct. Counsel for the defendant referred to the following cases to suggest that the defendant should not be made to pay costs personally:

(a) in *Re H Somapah Deceased* [1946] 1 MLJ 25; and

(b) *Tan Soo Lock v Tan Jiak Choo and another* [1935] 4 MLJ 202

THE ORDER

[65] After hearing both sides, I was impelled to the view that the costs in relation to encl 35 should be paid by the defendant personally (not out of the assets of the estate of the deceased) as his conduct was unreasonable. I then made the following orders:

59.1 Order in Terms of Enclosure 26 with costs to be paid by the Defendant to the Plaintiffs in the sum of RM5,000 (subject to 4% allocatur);

59.2 Enclosure 29 is dismissed with costs of RM5,000 to be paid by the Defendant to the Plaintiffs; (subject to 4% allocatur);

59.3 Enclosure 35 is dismissed with costs of RM30,000 to be paid 'personally' by the Defendant to the Plaintiffs (subject to 4% allocatur);

59.4 The Defendant's oral application for stay is dismissed;

59.5 I direct that a single order be taken out in respect of all three applications; and

59.6 Although the Defendant's affidavit affirmed on 28 April 2016 (Enclosure 53) has not been considered, it is to remain as part of the record, for purposes of inclusion in the record of appeal, if there is an appeal against the orders that were made today.

Order accordingly.

Plaintiff's application (encl 26) allowed with costs of RM5,000 and defendant's applications (encls 29 and 35) dismissed with costs of RM5,000 and RM30,000 respectively.

Reported by Kohila Nesan